

STAFF REQUEST FOR PERMISSION TO PROCEED WITH PROPOSED AMENDMENTS TO REGULATION 23334

Existing Regulation 23334 explains generally that in order to complete the dissolution, withdrawal, or merger process with the Secretary of State, a corporation must obtain a tax clearance certificate from the Franchise Tax Board and file it with the Secretary of State. Staff has determined that many corporations are unaware that they continue to remain subject to the minimum franchise tax until the actual completion of the dissolution or withdrawal process. Additionally, several legislative changes in the past few years have affected the tax clearance process for corporations seeking dissolution, withdrawal, or merger. As a result, staff believes that the existing regulation needs greater clarity.

Staff previously requested permission from the Board to proceed with a rulemaking action to amend the existing regulation. Those proposed amendments were noticed and public comments were received, but due to additional changes staff believed were necessary at that time, staff was unable to complete the project within the time period mandated under the Administrative Procedure Act. Staff has now prepared the additional amendments and, since staff believes this to be a non-controversial rulemaking project, intends to notice this rulemaking action to specify that a public hearing will not be held unless requested by an interested person at least 15 days before the close of the written comment period required under the Administrative Procedure Act.

Staff requests permission to proceed with these non-controversial proposed amendments to existing Regulation 23334.

Section 23334 is amended to read:

§23334. Tax Clearance Certificate.

(a) In General. A domestic corporation, including a tax-exempt domestic corporation, must obtain a tax clearance certificate from the Franchise Tax Board prior to dissolution or withdrawal before it can dissolve. A domestic corporation, including a tax exempt domestic corporation, that is the disappearing corporation in a merger with a foreign corporation not qualified to transact intrastate business must obtain a tax clearance certificate before the Secretary of State may file the merger agreement. A foreign corporation, including a tax exempt foreign corporation, that is qualified to transact intrastate business must obtain a tax clearance certificate before the Secretary of State may file a certificate of surrender of the corporation's right to transact intrastate business or before the Secretary of State may file the merger agreement when the disappearing corporation is a foreign corporation qualified to transact intrastate business.

(b) Tax Clearance Certificate Procedures.

(1) Within thirty days after receipt of the request the Franchise Tax Board receives a request for a tax clearance certificate, the Franchise Tax Board will either issue the tax clearance certificate or inform the requestor taxpayer of the conditions precedent to the issuance of the clearance that must be satisfied before the Franchise Tax Board will issue a tax clearance certificate.

~~If the liability cannot be determined within the 30-day period, a bond or deposit may be required to secure any tax which may be found to be due. In certain cases a clearance will be given upon the filing of an assumption of liability. However, issuance of the clearance does not relieve the corporation or its transferees of liability for any tax due or found to be due under Chapter 2. In the case of a foreign corporation which is in the process of withdrawing entirely from the State, a bond is generally required for the issuance of the clearance, if requested prior to the determination of the liability.~~

(A) The Franchise Tax Board may issue a tax clearance certificate on an expedited basis. A corporation needing a tax clearance certificate on an expedited basis must have a specific justification for requesting the expedited service, such as legal or financial difficulties that will occur if the Franchise Tax Board fails to issue a tax clearance within twenty-four hours of receipt.

(B) A corporation that is suspended or becomes suspended during the tax clearance process cannot receive a tax clearance certificate from the Franchise Tax Board. If a suspended corporation requests a tax clearance certificate, the Franchise Tax Board will advise the requestor of the requirements

to revive the suspended corporation in response to the request for a tax clearance certificate.

(2) Except in the case of a corporation that is suspended (see subsection (b)(1)(B) above), the Franchise Tax Board will issue a tax clearance certificate once all taxes have been paid or secured and once the corporation has filed all required returns, if necessary.

(A) A tax clearance certificate may be issued based upon any of the following:

1. Taxes paid: If a corporation requests a tax clearance certificate on the basis that the corporation paid or will pay all taxes due, the corporation must file a final tax return and pay any outstanding tax liability before the Franchise Tax Board will issue a tax clearance certificate. After the Franchise Tax Board reviews the corporation's file, including a final return, and determines that the corporation has paid all outstanding tax liability, the Franchise Tax Board will issue the tax clearance certificate and forward a copy to the Secretary of State.

2. Assumption of liability: If a corporation requests a tax clearance based on assumption of tax liability, the Franchise Tax Board will accept any individual or organization that can verify the financial ability to satisfy the entire potential tax liability of the corporation as an assumer for that corporation. As long as all appropriate pages of the request for a tax clearance certificate are completed, the assumption of tax liability has a current date and original signatures, and the assumer has the financial ability to satisfy the entire potential tax liability, the Franchise Tax Board will issue a tax clearance certificate and forward a copy to the Secretary of State. The assumption of tax liability will become effective when the Secretary of State files the dissolution, merger, or surrender documents and the corporation receives a tax clearance certificate from the Franchise Tax Board.

3. Surety bond: If a corporation requests a tax clearance based on a surety bond, the Franchise Tax Board will inform the corporation of the required amount of the surety bond, which will be no less than two thousand dollars (\$2,000). Once the corporation submits the requisite surety bond, the Franchise Tax Board will issue the tax clearance certificate and forward a copy to the Secretary of State. After the Franchise Tax Board audits the corporation's final return and all outstanding tax liability is satisfied, the Franchise Tax Board will release the surety bond.

4. Cash deposit: If a corporation requests a tax clearance based on a cash deposit, the Franchise Tax Board will inform the corporation of the required amount of the cash deposit, which will be no less than two thousand dollars (\$2,000). Once the corporation submits the requisite cash deposit, the

Franchise Tax Board will issue the tax clearance certificate and forward a copy to the Secretary of State. After the Franchise Tax Board audits the corporation's final return and uses the deposit to offset any outstanding tax liability, the Franchise Tax Board will release any remaining amount of cash deposit.

(B) Receiving a tax clearance certificate does not relieve the corporation, or its transferees, of any tax liability (including interest and penalties) that may be due or found to be due under Part 11 of Division 2 of the Revenue and Taxation Code.

(C) If the corporation has not filed a final return before the Franchise Tax Board issues a tax clearance certificate, the corporation, or its transferees, is responsible for filing one within two months and fifteen days after the close of the month in which the corporation ceases to exist.

(D) Notwithstanding anything in this regulation, all returns, including the final return, remain subject to audit until the expiration of the normal statute of limitations.

(c) Domestic General Corporations Seeking Dissolution.

(1) A domestic general corporation seeking dissolution must submit to the Secretary of State all documents required under the Corporations Code to effectuate dissolution and submit either i) a tax clearance certificate, ii) a request for a tax clearance certificate, or iii) the submitted Certificate of Dissolution must contain language stating that the tax liability will be satisfied on a taxes paid basis or that a person or organization assumes the tax liability, if any, of the dissolving corporation as security for the issuance of a tax clearance certificate from the Franchise Tax Board and is responsible for additional corporate taxes, if any, that are assessed and that become due after the date of the assumption of the tax liability, pursuant to Corporations Code section 1905, subdivision (a), subpart (3).

(A) When the corporation submits the required documents to the Secretary of State for filing pursuant to Corporations Code section 1905, the Secretary of State will file the Certificate of Dissolution. If a tax clearance certificate does not accompany the filing, the corporation's dissolution will be "conditional" pending the issuance of a valid tax clearance certificate by the Franchise Tax Board, pursuant to Corporations Code section 1905, subdivision (c).

(B) For tax purposes the corporation's existence continues until the Franchise Tax Board has issued, and the Secretary of State has received, a valid tax clearance certificate. Therefore, if a corporation does not satisfy all of the conditions necessary to receive a tax clearance certificate within a reasonable time, the corporation may be suspended and must be revived before a tax

clearance certificate will be issued. Under Corporations Code section 1905, subdivision (c), however, the corporate powers, rights, and privileges cease when the Secretary of State files the Certificate of Dissolution.

(2) In the case where the corporation submits a request for a tax clearance certificate to the Secretary of State, the Secretary of State will forward the request for a tax clearance certificate to the Franchise Tax Board.

(3) A general corporation will not be liable for the minimum franchise tax for the taxable year in which the Franchise Tax Board issues the tax clearance certificate if:

(A) the Secretary of State filed the corporation's Certificate of Dissolution before the beginning of that year and the corporation did not do business in this state during that taxable year; or

(B) the corporation's taxable year is 15 days or less before the Secretary of State filed the corporation's Certificate of Dissolution and the corporation did not do business in this state during that taxable year.

(d) Domestic Nonprofit Corporations Seeking Dissolution

(1) A domestic nonprofit corporation must request and receive a valid and current tax clearance certificate and submit all required documents to the Secretary of State before the Secretary of State may file the Certificate of Dissolution, pursuant to Corporations Code section 6615 (public benefit), Corporations Code section 8615 (mutual benefit) and Corporations Code section 9680 (religious).

(2) When the domestic nonprofit corporation receives a tax clearance certificate from the Franchise Tax Board, that corporation must file a Certificate of Dissolution with the Secretary of State on or before the expiration date shown on the tax clearance certificate.

(3) If the domestic nonprofit corporation does not have tax-exempt status, then the franchise tax, including the minimum franchise tax, will continue to be imposed until the domestic nonprofit corporation has ceased doing business in this state or the Secretary of State has filed the Certificate of Dissolution, whichever is later. If the nonprofit corporation's taxable year is 15 days or less before the Secretary of State files the nonprofit corporation's Certificate of Dissolution, however, the corporation will not be liable for the minimum franchise tax as long as the corporation did not do business in this state during that taxable year.

(e) Qualified Foreign Corporations Seeking Surrender.

(1) A qualified foreign corporation must request and receive a valid tax clearance certificate from the Franchise Tax Board and submit all required documents to the Secretary of State before the Secretary of State may file a Certificate of Surrender of Right to Transact Interstate Business.

(2) When the qualified foreign corporation receives a tax clearance certificate from the Franchise Tax Board, that corporation must file a Certificate of Surrender of Right to Transact Intrastate Business with the Secretary of State, on or before the expiration date shown on the tax clearance certificate. (See Corp. Code § 2112.)

(3) If the qualified foreign corporation does not have tax-exempt status, the franchise tax, including the minimum franchise tax, will continue to be imposed until the qualified foreign corporation has ceased doing business in this state or the Secretary of State has filed the Certificate of Surrender of Right to Transact Intrastate Business, whichever is later. If the corporation's taxable year is 15 days or less before the Secretary of State files the corporation's Certificate of Dissolution, however, the corporation will not be liable for the minimum franchise tax as long as the corporation did not do business in this state during that taxable year.

(f) General Corporations Merging with Other General Corporations. In the case of a statutory merger between two or more general corporations:

(1) When the surviving corporation is a foreign general corporation not qualified to transact intrastate business and the disappearing corporation is a domestic general corporation, the merger becomes effective in accordance with the law of the surviving corporation's jurisdiction, except as provided by Corporations Code section 1108, subdivision (e). However, the disappearing domestic corporation must obtain a tax clearance certificate from the Franchise Tax Board and submit the tax clearance certificate along with the merger documents required by the Corporations Code before the Secretary of State will file the merger documents and terminate the existence of the domestic corporation. (See Corp. Code §§ 1108 and 1107.5.)

(2) When both the surviving and disappearing corporations are domestic general corporations, the merger becomes effective when the Secretary of State files the required merger documents. The Secretary of State will file the merger documents without a tax clearance certificate issued by the Franchise Tax Board and will notify the Franchise Tax Board of the merger. (See Corp. Code § 1107.5.)

(3) When the surviving corporation is a qualified foreign general corporation and the disappearing corporation is a domestic general corporation, the merger becomes effective in accordance with the law of the surviving

corporation's jurisdiction. However, the surviving corporation must submit the required merger documents to the Secretary of State for filing. The Secretary of State will file the merger documents without requiring the domestic corporation to obtain a tax clearance certificate from the Franchise Tax Board and will notify the Franchise Tax Board of the merger. (See Corp. Code §§ 1108 and 1107.5.)

(4) When the surviving corporation is a domestic general corporation and the disappearing corporation is a qualified foreign general corporation, it is necessary to obtain a tax clearance certificate from the Franchise Tax Board for the disappearing qualified foreign corporation. The tax clearance certificate and the required merger documents must be submitted to the Secretary of State for filing. Each disappearing qualified foreign corporation, by virtue of filing the required merger documents, will automatically surrender its right to transact intrastate business as of the date of the filing by the Secretary of State. (See Corp. Code § 1108.)

(g) Other Organizations.

(1) Other Organizations Required to Obtain a Tax Clearance Certificate.

(A) Domestic limited liability companies seeking cancellation of their articles of organization and foreign limited liability companies seeking cancellation of their registration to transact intrastate business are required to obtain a tax clearance certificate under Revenue and Taxation Code section 17941 et seq.

(B) Domestic limited liability partnerships seeking cancellation or cessation of their registration as a limited liability partnership and foreign limited liability partnerships seeking cessation of their registration either as a limited liability partnership, or to conduct intrastate business are required to obtain a tax clearance certificate under Revenue and Taxation Code section 17948 et seq.

(2) Organizations Not Required to Obtain a Tax Clearance Certificate.

(A) A tax clearance certificate is not required for organizations not created under the laws of California or qualified to transact intrastate business in California with the Secretary of State.

(B) These organizations, however, are still required to file a final return with the Franchise Tax Board pursuant to Revenue and Taxation Code section 18601.

(h) Examples.

EXAMPLE 1: Corporation B, a calendar year taxpayer that is a general corporation incorporated in this state, ceases all business activities on December

22, 2000. On December 29, 2000, B submits to the Secretary of State dissolution documents conforming with the corporations code and a request for a tax clearance certificate based on taxes already paid, whereupon the Secretary of State files the certificate of dissolution and grants B a dissolution conditioned on the Franchise Tax Board issuing a tax clearance certificate. The Secretary of State forwards the request for a tax clearance certificate to the Franchise Tax Board on January 3, 2001. On January 29, 2001, the Franchise Tax Board informs B that, as conditions precedent to receiving a tax clearance certificate, B must file a final tax return and pay the franchise tax for the 2000 taxable year. B files the final return and pays the franchise tax on March 1, 2001. The Franchise Tax Board audits the returns for all outstanding taxable years, including the final return, and then issues the tax clearance certificate, sending a copy to the Secretary of State. The dissolution will then become final as of December 29, 2000, the date the documents were filed with the Secretary of State. Pursuant to Revenue and Taxation Code section 23332, B will not be subject to the minimum franchise tax for the 2001 taxable year because B has met each of the requirements of that section by ceasing all business activities and filing the dissolution papers before commencement of the 2001 taxable year.

EXAMPLE 2: Assume the same facts as in EXAMPLE 1, except that B does not file the final return and pay the franchise tax for 2000 on March 1, 2001. On January 3, 2002, the Franchise Tax Board suspends B pursuant to Revenue and Taxation Code section 23301. On February 13, 2002, B files a final return but the Franchise Tax Board is unable to issue a final tax clearance certificate because B is suspended.

EXAMPLE 3: Corporation C, a domestic general corporation, is in the process of merging with Corporation D, another domestic general corporation, where D will be the surviving corporation. C and D have agreed to the terms of the merger and file merger documents with the Secretary of State. The Secretary of State will file the merger documents without receiving a tax clearance certificate for C from the Franchise Tax Board. The Secretary of State will inform the Franchise Tax Board of the merger and termination of C's existence.

EXAMPLE 4: Assume the same facts as in EXAMPLE 3, except Corporation D, the surviving corporation, is a foreign general corporation not qualified to transact intrastate business. To effectuate the merger D is required to follow the laws of the jurisdiction under which it is incorporated. However, D is required to submit the required merger documents to the Secretary of State and C must obtain a tax clearance certificate from the Franchise Tax Board before the Secretary of State will file the merger documents.

(i) Definitions. For purposes of this regulation, the following terms mean:

(1) "Domestic" means any corporation formed under the laws of the State of California.

(2) "Corporation" means any entity recognized as a corporation for purposes of the Corporations Code and Chapter 2 of Part 11 of the Revenue and Taxation Code, including both general corporations and nonprofit corporations.

(3) "Corporations Code" means the Californian Corporations Code.

(4) "Foreign" means any corporation formed under the laws of any jurisdiction other than the State of California.

(5) "General corporation" means a corporation that is organized under Division 1 of Title 1 or the Corporations Code, section 100 et seq., commonly referred to as stock corporation or business corporation.

(6) "Nonprofit" means a corporation organized under Division 2 of Title 1 of the Corporations Code section 5000 et seq., commonly referred to as non-stock corporations.

(7) "Organization" includes a corporation, a limited liability company, or a limited liability partnership, limited partnership, partnership, trust, or any other entity.

(8) "Qualified" means the foreign corporation has received a certificate of qualification from the Secretary of State for the right to transact intrastate business.

(9) "Secretary of State" means the State of California, Office of Secretary of State.

(j) Cross-References. All references to provisions of the Corporations Code, discussion of the corporate law consequences of various transactions, and discussion of the Secretary of State's procedures are intended to be illustrative only and are not intended to have substantive effect. For information regarding the Corporations Code provisions used in this regulation, the corporate law consequences of the various transactions, and the Secretary of State's procedures relating to dissolution, surrender, or merger please contact the Secretary of State. The following cross-references are relevant for purposes of this regulation:

(1) For rules describing the corporate law procedures for effectuating dissolution of a general corporation, see Corporations Code section 1900 et seq.

(2) For rules describing the corporate law procedures for effectuating dissolution of a nonprofit corporation, see Corporations Code section 6610 et seq. (public benefit), Corporations Code section 8610 et seq. (mutual benefit) and Corporations Code section 9860 (religious).

(3) For rules describing the corporate law procedures effectuating surrender of the right to conduct intrastate business for a foreign corporation, see Corporations Code section 2112.

(4) For rules describing the corporate law procedures for effectuating a merger of general corporations, see Corporations Code section 1100 et seq.

(5) For rules describing the corporate law procedures for effectuating a merger of nonprofit corporations, see Corporations Code section 6010 et seq. (public benefit), Corporations Code section 8010 et seq. (mutual benefit) and Corporations Code section 9640 et seq. (religious).

(6) For rules describing the corporate law procedures for effectuating interspecies mergers see Corporation Code section 1113.

(7) For rules describing the suspension and revivor process, see Revenue and Taxation Code sections 23282 and 23301 et seq.

(8) For rules describing the imposition of the franchise tax for the last taxable year of domestic corporations, see Revenue and Taxation Code sections 23114 and 23332.

(9) For rules describing the use of a final return as a request for a tax clearance certificate, see Revenue and Taxation Code section 23335.

(10) For rules describing audit procedures, including statute of limitations for issuing a notice of proposed assessment, see Revenue and Taxation Code section 19031 et seq.

NOTE: Authority cited: Section ~~19503~~26422, Revenue and Taxation Code.
Reference: Section 23334, Revenue and Taxation Code.